

Q & A: WORKFORCE ISSUES DURING THE LOCKDOWN

AS AT 27 MARCH 2020 (10AM)

This Q&A constitutes our expectations as to how the business lockdown will take effect. It is not an official document, but intended to bring some clarity to businesses at the current point in time.

1. Are employers obliged to pay employees during the lockdown?

Many employers are asking whether they need to continue to pay their employees during the lockdown.

During the lockdown there will be three categories of employees:

- employees in **essential businesses** or those in non-essential businesses who perform essential functions, i.e. **key persons**, who would **continue to work** and should **continue to be paid**;
- employees who are **not in essential businesses** but who **can work remotely**, and who would accordingly **continue to be paid**; and
- employees who are **not in essential businesses** and who are **not key persons** and who **cannot work remotely**.

Employees in non-essential businesses who are not key persons and who cannot work remotely:

The issue in relation to payment arises in relation to this third category of employee. There is no legal obligation to pay these employees. The employer's obligation to pay arises from the employee's ability and willingness to tender services. During the national lockdown period, the employees cannot and may not work – not because the employer requires that they do not work, but because of the lock down order issued by government. (This situation is different from the case where the employer requires the employee not to be at work because of a reasonable apprehension of harm in that the employee had been in contact with someone who tested positive for Covid-19, or presents with flu-like symptoms. Here it is the employer that requires the employee to be absent on the basis of the employer's duty to ensure a safe and healthy work environment. In these circumstances, the absence should be paid, unless agreed otherwise.)

As regards employees who cannot work during the lock-down period, of course, if the employer can afford to pay the employee, it may decide to do so, and pay her/his full remuneration or a portion thereof as a “lock down allowance” of sorts; or grant the employee a loan to be recovered in due course.

2. Can an employer require its employees to take annual leave during the lockdown?

It is also permissible to require the employees to take (paid) annual leave. It is well-established in terms of the Basic Conditions of Employment Act that where an employer and employee cannot agree on the time when the employee would take leave, the employer may determine the time when the employee will take leave. It is accordingly permissible for employers to require that employees take their annual leave during the lockdown period. This is a sensible way to ensure that the employee is paid during this time. The Department of Employment and Labour confirmed, in a Directive (attached) on 26 March 2020 that it is lawful to require employees to take annual leave during the lockdown period.

3. Should employers issue employees with masks for work and travel, if employed in an essential service?

Masks are not necessary and not prescribed in the Disaster Management Regulations. According to the World Health Organisation: If a person is healthy, they only need to wear a mask if they are taking care of a person with suspected 2019-nCoV infection. Masks are effective only when used in combination with frequent hand-cleaning with alcohol-based hand rub or soap and water. If a person wears a mask, then they must know how to use it and dispose of it properly.

4. When will the details / processes concerning the disbursement of UIF benefits in terms of the National Disaster Fund be made available to employers (there are currently conflicting messages in the public domain)

The Minister of Employment and Labour issued a directive, in the Government Gazette, on 26 March 2020 pertaining to the COvid-19 Employee/Employer Temporary Relief Scheme (C19 TERS), and quarantine benefits (a copy is attached). We will communicate further details in due course.

- 5. If my business is not designated as an essential service but during the lockdown, there is an emergency at the office (ie: IT server fails and needs to be fixed in order for employees who are working from home to continue to do so), will an employee be permitted to travel to the office to attend to the problem?**

Yes, these activities are now covered. Regulation 11B(4A)(a) provides that all businesses or premises must have care and maintenance that is essential to the prevention of the destruction or significant impairment of working areas, plant, machinery or inventory, or to permit orderly shutdown arrangements. The Ministers for Trade and Industry and Employment and Labour may issue directives in this regard.